STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: MAY 31, 2022

IN THE MATTER OF:
Appeal Board No. 621566

PRESENT: MICHAEL T. GREASON, MEMBER

In Appeal Board Nos. 621566 and 621567, the employer appeals from the decisions of the Administrative Law Judge filed February 3, 2022, which overruled the initial determinations holding, effective July 19, 2021, that the wages paid to the claimant, a professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (10); and charging the

claimant with an overpayment of Federal Pandemic Unemployment Compensation of $1500 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020.

At the combined telephone conference hearings before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances by the claimant and on behalf of the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked for the Lehman College of the City University of New York (CUNY)

as an adjunct lecturer in the spring 2021 semester, teaching two classes and was paid at the rate of $77.45 per hour. Each class consisted of 60 classroom hours during a 15-week semester. Additionally, under the current contract,

adjunct professors also receive 15 hours of professional time at the same pay rate for each course. The claimant worked and was paid for 120 hours of teaching time and 30 hours of professional time, for a total of 150 hours during the spring 2021 semester.

The claimant teaches English Composition 1 and 2 in the college's Freshman Year Initiative Program: two classes of English Composition 1 in the fall semester and two classes of English Composition 2 in the spring semester. The claimant has worked for Lehman College since the 2018 fall semester and none of her classes have ever been canceled.

On April 22, 2021, the Director of the Freshman Year Initiative sent the claimant an email informing her that she would teach two courses of English composition 1 in the fall 2021 semester on Tuesdays and Thursdays, with one class meeting from 9:00 AM to 10:40 AM and the other class meeting from noon to 1:40 PM. On April 28, 2021 the Director of the Freshman Year Initiative sent the claimant a letter telling her that the Department of Freshman Year Initiative at Lehman College intended to reappoint her for the fall semester of the 2021 academic year at the rank of adjunct lecturer, for which her salary would be $79 per hour, and that she would also be compensated for 30 office hours for that semester. The letter also noted that "this appointment is subject to sufficiency of registration, changes in curriculum and financial ability." The claimant signed the letter indicating that she accepted the offer and dated her acceptance on May 3, 2021.

Although the claimant acknowledged that she taught basic freshman year classes and that none of her classes had ever been canceled, she was concerned about the conditions set forth in the appointment letter due to the pandemic. The Director of the Freshman Year Initiative Program stated the conditional language in the letter was "boilerplate" and that classes had never been canceled due to budgetary reasons and were only occasionally canceled for sufficiency of enrollment issues, but that that had never happened to the claimant. Additionally, he explained that there have been no budget cuts due to the pandemic and the enrollment for the fall 2021 semester in the Freshman Year Initiative program in which the claimant taught was the highest freshman enrollment in the history of Lehman College.

The claimant filed a claim for benefits on May 24, 2021; she received the benefits at issue.

OPINION: Labor Law Section 590.10 requires that the weeks and wages earned by an employee in a professional capacity for an educational institution be disregarded for purposes of determining whether such an employee is eligible to file a valid original claim for benefits during a period between academic terms or years if such employee had reasonable assurance of returning to work for an educational institution in the following semester or academic year. Reasonable assurance exists when an employing educational institution expresses a good-faith willingness to rehire a professional employee of an educational institution for the upcoming school year or term and the terms and conditions of the offer are not substantially less favorable to the claimant than in the prior year or term. It is the responsibility of the employer to demonstrate with competent testimony from knowledgeable witnesses concerning the employer's personnel practices and procedures that these basic conditions have been met. Absent proof that these conditions have been satisfied there is no reasonable assurance of employment in instructional capacity.

The United States Department of Labor Employment & Training Administration Unemployment Insurance Program Letter (UIPL) 5-17, dated December 22, 2016, gives guidance with respect to interpreting the meaning of reasonable assurance under Sections 3304(a)(6)(A)(i) - (iv) of the Federal Unemployment Insurance Tax Act (FUTA). Pursuant to UIPL 5-17, in order for a claimant to have reasonable assurance in the following year or term, the offered employment must satisfy three prerequisites: (1) the offer of employment may be written, oral, or implied, and must be a genuine offer; that is, an offer made by an individual with actual authority to offer employment; (2) the employment offered in the following year or term, or remainder of the current academic year or term, must be in the same capacity; and (3) the economic conditions of the job

offered may not be considerably less in the following academic year or term (or portion thereof) than in the first academic year or term (or portion thereof). The Department interprets "considerably less" to mean that the economic conditions of the job offered will be less than ninety percent of the amount the claimant earned in the first academic year or term.

The employer's email of April 22, 2021, informing the claimant that she would be teaching two classes in the fall semester and giving her fall schedule cannot be considered to be an offer of reasonable assurance as although it contained information concerning the number of courses and hours she would be teaching and included the dates and times the courses would be held, it did

not include information concerning the amount of earnings per hour the claimant would be paid. Without this information there could be no determination that the claimant would earn the same or substantially the same in the fall 2021 semester as she had earned in the spring 2021 semester.

However, the employer sent the claimant an appointment letter for the fall 2021 semester on April 28, 2021 informing her that she was being reappointed as an adjunct lecturer for the fall 2021 semester and that her salary would be $79 per hour. At this point, reading the two communications together, the employer made an offer of reasonable assurance to the claimant as the employer offered the claimant the same number of classes that she had taught in the spring 2021 semester at an increased per credit hour compensation.

While the claimant has challenged the bona fides of that offer by noting that her appointment was conditioned on sufficiency of enrollment, curriculum changes and financial ability and highlighting her concern that the pandemic would adversely affect those conditions, the employer credibly testified that there were no budgetary concerns at that time, and that the enrollment for the fall 2021 semester was the highest in the history of the college. We also note that the claimant admitted that her assigned classes had never been canceled during her employment at Lehman College since fall 2018. Given the length of the claimant's continuous employment, and absent demonstrating a recent history of downsizing the claimant's course load, the claimant's concerns, without more, do not in and of themselves establish that such an air of uncertainty existed as to cast doubt on the employer's good faith effort to employ the claimant at the time the offer was made (see Appeal Board 607796). The Court has held that reasonable assurance is not a guarantee of employment but exists when the employer expresses its intent to employ the claimant and makes a good faith effort to do so. The fact that an employer's offer is contingent on certain preconditions does not negate the existence of reasonable assurance when the offer is made (See Matter of Whiting, 243 AD 2d 904 (3rd Dept 1997)). Accordingly, we conclude that the claimant was given reasonable assurance of continued substantially similar employment in the 2019-2020 academic year, and therefore, the exclusionary provisions of Labor Law section 590 (10) apply for the period between the academic years. Consequently, the claimant is not eligible to receive benefits for that period of time. Therefore, the $1500 FPUC benefits she received constitute an overpayment of benefits. That overpayment is recoverable pursuant to federal law.

DECISION: The decisions of the Administrative Law Judge are reversed.

In Appeal Board Nos. 621566 and 621567, the initial determinations, holding, effective July 19, 2021, that the wages paid to the claimant, a professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590

(10); and charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation of $1500 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, are sustained.

The claimant is denied benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER

Federal law provides that New York State can waive repayment of Pandemic Emergency Unemployment Compensation (PEUC), Federal Pandemic Unemployment Compensation (FPUC), Lost Wages Assistance (LWA), Mixed Earners Unemployment Compensation (MEUC) or Pandemic Unemployment Assistance (PUA) benefits overpaid to the claimant if the overpayment was not the claimant's fault and repayment would be contrary to equity and good conscience. For more information on the overpayment waiver process and instructions to request a waiver, please visit the New York State Department of Labor's website, https://dol.ny.gov/overpayment-waiver-and-appeal-process.